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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 402

OWEN A. FRANK AND DOROTHEA FRANK,
Petitioners,

vs.

THE COUNTY OF SCOTTS BLUFF.

BRIEF OF RESPONDENT OPPOSING CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NE-
BRASKA

FLOYD E. WRIGHT,
JACK L. RAYMOND,
Counsel for Respondent.

THE
MOUNTAIN

There is a mountain in the heart of the
country, and it is called the Mountain of the
Sun. It is a very high mountain, and it is
very old. It is the highest mountain in the
country, and it is the oldest mountain in the
country. It is the mountain that the sun
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Reference to Opinion of State Court

The opinion of the Supreme Court of Nebraska on the appeal from the decree of foreclosure is reported in 142 Neb. 698. The opinion on the appeal from the decree confirming the sale has not been officially reported but is found in 13 S. C. J. 216, 13 N. W. (2d) 900.

Statement of the Case

The principal objection to the jurisdiction of this court is the fact that no timely tender of the alleged federal questions set forth in the petition for writ of certiorari and brief in support thereof was ever made to any state court in any proceeding in which it was proper for the state courts, under the constitution and statutes of the state, to determine them.

Issues in the Trial Court

The petition alleged the levy and assessment of taxes for the years 1919 to 1936, both inclusive, upon the following described real estate situate in the County of Scotts Bluff, Nebraska, to wit:

“All that part of the Northwest Quarter of Section 24, Township 22 North, Range 55 West of the Sixth Principal Meridian lying south of the Winter Creek Canal,

alleged the non-payment of these taxes, sale thereof by certificate to the County of Scotts Bluff, and all other requirements for the foreclosure of the lien evidenced by the tax sale certificate (R. 1-7).

The answer and cross petition (R. 7) admitted most of the material allegations of the petition, but alleged in substance, that the taxes evidenced by the certificate against the tract of land therein described had been levied against two separate pieces of land, the total of the two comprising the whole of the above described premises, that each piece was described as “Pt NW $\frac{1}{4}$ Sec. 24, Twp. 22, Range 55” on a separate line in both the assessment Rolls and the Tax Lists, each line carrying a different valuation and the name of the owner being shown as “DeMott, L. S.” on one line and “Frank, William” on the other. Paragraph 1 of the cross petition (R. 9) alleges, however, that one William Frank became the owner of all of the land described in the petition in 1916, and conveyed it to petitioner, Owen A. Frank, on February 23, 1925, since which time petitioner has been the owner thereof. The only issue now important which was expressly tendered by the answer and cross petition was that the description appearing upon the assessment rolls and tax lists for the years 1919 to 1929 inclusive was not sufficient to identify the property described in the petition or any part thereof, and that therefore the taxes alleged to

have been assessed against the property for said years are void and constitute no lien thereon (R. 7-12).

The trial court, after an examination of the pleadings and process in the case, after hearing *all of the evidence offered*, and after having considered the briefs of the parties (R. 13), and having taken the case under advisement for further study (R. 13-14), found generally for the respondent and against the petitioners in this court (R. 14). This finding is, of course, inclusive of a finding that the description set forth by the tax lists and assessment rolls was not so indefinite as to render it void; and was inclusive of a finding that the assessment had, in fact, been made against a single tract listed upon the tax records on two lines. No federal right, privilege or immunity, was alleged in the answer and cross petition filed in the trial court and no federal question was otherwise raised therein (R. 7-12). The trial court decided no Federal question (R. 13-19).

Issues in the Supreme Court of Nebraska on the First Appeal

The assignments of error presented on the first appeal to the Supreme Court of Nebraska are not found in the record. The reason why they do not appear in this record is obvious from the statement by the Supreme Court of Nebraska of their substance. The opinion of the Nebraska Supreme Court (R. 52) states:

“The question presented here is whether or not the description on the assessment records and tax lists is sufficient to sustain the tax sale certificate and to identify the property against which plaintiff proceeds. The trial court held that it was. Defendants appeal. We affirm the judgment.”

From the foregoing quotation from the opinion, which is the only evidence in the record on the question of what

issues were tendered and litigated on the first appeal, it is clear that no questions of a federal right, privilege or immunity or of any other federal nature were tendered to the Supreme Court of Nebraska upon the appeal from the decree of foreclosure. The Supreme Court of Nebraska held, under a specific statute, that listing the land in the name of one DeMott did not render the tax void or voidable or the assessment invalid. The Court says (R. 54):

"Section 77-2034, Comp. St. 1929, provides: 'No sale of real property for taxes shall be void or voidable on account of the same having been assessed in any other name than that of the rightful owner.' * * * In the light of the statute the description of the property in the various assessment records and tax lists must be considered as though at all times the name Frank had been used where DeMott was used."

(R. 55) "Defendants argue that the land was not sufficiently described because there is no way that any one can segregate that part assessed following the name of Frank from that part assessed following the name DeMott; that there are no defined boundaries and no data by which either tract may be located.

"The fallace of defendants' argument lies in the *fact* that to sustain it they must rely on an ownership of part of this land by DeMott, and an inability to separate DeMott's interest from Frank's; where *in fact* DeMott had no interest in the land and *there were no different interests* to segregate, as there was at all times herein involved but one interest.

"This is a matter of simple arithmetic. If the two 'Pt. N. W. $\frac{1}{4}$'s are added together the total of the land below the canal owned by Frank is described. If 75.2 acres and 75.2 acres are added together the total of that acreage is shown. If the two assessed values are added together the total assessed valuation is had and if the two tax items are added together the total tax is determined.

"Are these taxes void because of the fact that this addition was not actually done on the assessment rec-

ords and tax lists, or was not done before those lists were made up and because of the fact that the totals were not used? We do not think so." (Italics ours)

A charge is made in the petition for writ of certiorari and supporting brief against the intellectual honesty of the Nebraska Supreme Court in its findings of fact to the effect that there is involved in this action only a single assessment against a single identifiable tract of land for any of the years involved from 1919 to 1936. An example is found at p. 21 of petitioners' brief in support of their prayer for certiorari. However, none of the evidence considered by the trial court, and none of the evidence in the record before the Supreme Court of Nebraska, is brought to this court except the tax lists themselves and the assessment records. Counsel also overlook the court's discussion of both the local case law and statute law as applied to the distinguishing facts of this case.

Without entering into the proffered debate upon that question, it is sufficient here to point out that no question of violation of any Federal right, privilege or immunity was tendered to the Supreme Court of Nebraska on the first appeal, and none was considered by that court. No claim was made on the first appeal that the defendant had been deprived of due process of law by the decree of the trial court ordering the sale of the property as one tract, or that the decree denied him the equal protection of the laws.

The record fails to show that any motion or petition for rehearing was ever filed in the Supreme Court of Nebraska subsequent to its first opinion, as allowed by Rule 18(a) Revised Rules Supreme Court of Nebraska, set forth on p. 50 of the appendix to petitioner's brief, and while the Supreme Court of Nebraska had jurisdiction of the cause and the power to correct any errors it might have made in its decision. The record thus fails to show that any

Federal question relating to the validity of the decree of the trial court or the opinion and judgment of the Supreme Court was ever before that court while, in accordance with state practice, it was proper for that court to entertain and decide it.

The first place where any Federal question is even intimated by the record is in the objections to confirmation of the sale held pursuant to the decree of the District Court as finally affirmed by the Nebraska Supreme Court (R. 24-25). At this time, it was not proper under state practice, for the trial court to entertain such questions. (See decision of Nebraska Supreme Court in the instant case (R. 47), and the cases therein cited at R. 50-51.) The trial court overruled the objections to confirmation, and petitioners again appealed to the Supreme Court of Nebraska. Upon this appeal their assignments of error are exhibited by the record (R. 28-30).

The only basis of the decision of the Supreme Court of Nebraska on this second appeal, was that the issue of fact upon which the federal questions are attempted to be predicated, the issue of whether the taxes were, *in fact*, assessed and levied as upon one tract or two, had already been adversely and finally adjudicated against petitioner, and that, at that time, in that form of proceedings, under the state practice it was not proper for the court to entertain such questions.

This is summarized in the two syllabus points, as follows:

“1. The only matters inquired into and adjudicated in the proceedings for confirmation of a judicial sale are those steps which the law requires shall be had and done for the satisfaction of the decree.

“2. Alleged errors of law in a decree and in the proceedings leading thereto are not reviewable upon objections to confirmation of a sale had thereunder.”

In the body of the opinion (R. 49-50), the Supreme Court of Nebraska demonstrates, *per dicta*, the distinctions existing between the facts of the cases upon which defendant relied, and now relies, in alleging the invalidity of the original decree of foreclosure and its affirmance, and the facts found both by the trial court and the Supreme Court in the instant case, and the consequent difference in the application of the law. The court also stated that its analysis of the facts of these cases clearly illustrates that there is no merit in the contention that defendant was denied the equal protection of the laws. The foregoing was purely *dictum*, and by way of explanation of its previous holdings in this case and in the cases relied upon by defendant. The real decision of the court, as shown by the paragraphs immediately following and the decisions there cited, was that it was not proper, under state practice, in the proceeding before it, to reexamine its previous finding of fact or to entertain the question of whether there had been a denial of equal protection, or any other federal right.

Argument

Extended argument is unnecessary to demonstrate the lack of jurisdiction of this court. It is a familiar rule that:

"The state laws and practice relative to the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

John v. Paullin, 231 U. S. 583, 58 L. Ed. 381, 34 Sup. Ct. Rep. 178.

In another case, this court has said:

"To become the basis of a proceeding in error from this court to the Supreme Court of a state 'a right, privi-

lege, or immunity' claimed under a statute of the United States must be 'especially set up and claimed,' and must be denied by the state court. Rev. Stat. Sec. 709, Judicial Code, Sec. 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, Sec. 1214). This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice (*Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375), and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of Federal right. *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *John v. Paullin*, 231 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137."

Atlantic C. L. R. Co. v. Mims, 242 U. S. 532-537, 61 L. ed. 476, 478.

The Supreme Court of Nebraska held in this case (R. 50-51):

"It has long been the rule that the only matters inquired into and adjudicated in the proceedings for confirmation of a judicial sale are those steps which the law requires shall be had and done for the satisfaction of the decree. Comp. St. 1929, sec. 20-1531; *Schriber v. Platt*, 19 Neb. 625, 28 N. W. 289; *Best v. Zutavern*, 53 Neb. 619, 74 N. W. 81; *Wollmer v. Wood*, 119 Neb. 248, 228 N. W. 541; *Douglas County v. Barker Co.*, 125 Neb. 253, 249 N. W. 607; *Holferty v. Wortman*, 135 Neb. 732, 283 N. W. 855; *Wallace v. Peterson*, 136 Neb. 39, 284 N. W. 866.

"There is a further rule that is here applicable. Alleged errors of law in a decree and in the proceedings leading thereto are not reviewable upon objections to confirmation of a sale had thereunder. *Cochran v.*

Cochran, 1 Neb. (Unof.) 508, 95 N. W. 778; Beatrice Paper Co. v. Beloit Iron Works, 46 Neb. 900, 65 N. W. 1059; Hoover v. Hale, 56 Neb. 67, 76 N. W. 457; Cox v. Parrotte, 59 Neb. 701, 82 N. W. 7; Douglas County v. Barker Co., supra; Farmers Security Bank v. Wood, 132 Neb. 175, 271 N. W. 349.

"Defendants' attack here is not upon the proceedings had subsequent to the decree, but upon the decree itself, and upon the questions of fact and law that were determined in the decree. They are not reviewable upon objections to the confirmation of the sale."

The Nebraska Statute cited by the Supreme Court of Nebraska in the foregoing quotation from its opinion herein, Sec. 20-1531, Comp. St. Neb. 1929, so far as pertinent here is as follows:

"20-1531. Confirmation of Sale. If the court, upon the return of any writ of execution, or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provision of this title and that the said property sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements * * *."

The foregoing statute, as interpreted by the Supreme Court of Nebraska in the instant case, and in the cases cited therein (R. 50-51), clearly limits the scope of the inquiry by the trial court on the hearing of motions for and objections to confirmation of a judicial sale, to questions relating to the regularity of the proceedings of the officer conducting the sale, the value of the property sold, and the circumstances and conditions of the sale, as well as the possibilities of greater return from another sale.

If this court should entertain certiorari herein and assume jurisdiction of this cause, it would only be upon the assumption that it could and would grant petitioners relief if, upon full hearing of the merits of their petition, it should be determined that they were entitled to it. Assume, solely for the sake of argument, that petitioner had a valid complaint upon federal grounds against the tax levied, the decree rendered thereon, and the judgment of the Supreme Court of Nebraska affirming the same. Would this court, even then, be in a position to render him any relief? Would this court issue a mandate to the Supreme Court of Nebraska directing that court to violate a local procedural statute, against which statute no complaint of invalidity has been made? Would this court direct the Supreme Court of Nebraska to set aside its many decisions announcing a principle of practice uniformly adhered to throughout the history of the state, and grant relief to petitioners when it has uniformly refused relief to others in identical circumstances? Would this court direct the Supreme Court of Nebraska to reexamine its decision of questions of fact, which decision has become final under state practice, and over which the State Supreme Court has lost jurisdiction, no federal question having been raised in connection therewith while the cause was before the Supreme Court of Nebraska on its merits, and no review having been sought from this court during the statutory time following the decision of the Supreme Court of Nebraska on the merits?

This court has already adequately answered these questions in the quotations above made from *John v. Paullin, supra*, and *Atlantic C. L. R. Co. v. Mims, supra*, and the many cases cited in the quotations from those two. It is obvious that federal rights involved in proceedings before state courts must be asserted and protected in the manner prescribed by state practice.

If petitioners had any federal question, the same should have been asserted in their answer and cross petition filed when the case was before the trial court upon its merits. They might not have been too late if they had asserted those rights in their first appeal to the Supreme Court of Nebraska. Petitioners chose to submit the case then, entirely upon issues of fact and purely local questions of law. They still might not have been too late to have asserted the alleged federal rights, if they had availed themselves of the opportunity of calling them to the attention of the Supreme Court of Nebraska by motion for rehearing as provided by the rules of the latter court. They deliberately chose to pass all of these opportunities of tendering the questions which they now ask this court to adjudicate in review, until the State Supreme Court had lost jurisdiction of the merits of the cause by return of its mandate, and the trial court had no further inquiry to make under local practice than a determination of the regularity of the execution of a final judgment. The inference is forcible that petitioners' presentation of the petition for writ of certiorari is dilatory.

Conclusion

Respondent respectfully submits that the petitioners have failed to demonstrate that a writ of certiorari should issue, and that even a studious and careful deletion of the record is unavailing to show proper and timely presentation of any federal question to the state courts, and that the petition should therefore be denied.

Respectfully submitted,

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